Chapter 18

Forensic Medicine & Human Rights Issues

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."—UDHR, 1948 Article 5.

1. Medical Examination of Detainees for Torture Identification

In strict sense, 'detainees' are the persons who are under the control of State for the purpose of criminal investigation or are awaiting trial. In broad sense, as pointed by Supreme court in *Prem Kumari Shahi* case[1]

"Detainee is a person who is taken into control by preventing such person from exercising constitutional and lawful individual freedom, disregard of whether such controller is security agency, institution or person. In this sense, the meaning of term detainee is not just confined within police arrest and control for investigation or confinement of prisoners into prison but any of such acts that make such person deprived of individual freedom."

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1 *Prem Kumari Shahi on behlf of Rajhani Shahi v. National Women Commission et.al. 2070,* D.N. 8945

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Liberty is the rule, to which detention must be an exception. Principle of minimum intervention should be adhered by the state. As stated in Rule 6.1 of the United Nations Standard Minimum Rules for Non-Custodial Measures, the so-called 'Tokyo Rules', "pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim". Inalienable constitutional right to life, liberty and security of suspect imposes duty on Government of Nepal to invest more on forensic oriented investigation and march ahead towards *pahila suna ani thuna* (first investigate then arrest) by departing from long practiced traditional approach of *pahila thuna ani suna* (first arrest then investigate).

Investigating without arrest is a general rule and investigating after arrest is an exception. Rule 25 of Crime Investigation Regulation, 2075 B.S. prevents police from arresting suspect unless there is reasonable basis for arrest. This welcoming new legal provision has to be executed with modern human rights friendly mindset. Detention is an exception and to be carried only when strictly needed for social peace, order, security, and for preventing suspect from damaging evidences or for guarantee of execution of sentence.

Though certain minimum human rights of detainee are compromised by reason of detention, protection of rights of detainee is the duty of state. All state parties to UN Torture Convention, including Nepal has an international responsibility to take effective legislative, administrative, judicial and other measures to prevent torture.[2] Every human being has equal right to life, liberty and security. Personal freedom of an individual can only be deprived lawfully. Criminal justice system of a state

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Art. 2(1). Nepal ratified the convention against Torture in 1991, four years after its entry into force.

should not be invoked through cruel and inhumane treatment of accused in the name of fact finding or investigating a crime. That would be against the principle of rule of law and a violation of human rights of a person..

Detainees are not the subject of mercy of any law enforcement authority, government official or any individual. They have inalienable right not to be tortured, punished or inhumanly treated in the name of crime investigation, process of finding fact. Neither an accused of crime nor a convicted criminal can be subjected to torture. They can only be punished or treated in course of execution of lawful decision of courts in case convicted for alleged crime.

A detainee subjected to torture, whether physical or mental in custody by law enforcement agency, is entitled to reasonable compensation from such perpetrator and the perpetrator is liable for up to 5 years imprisonment or up to Rs 50,000/- fine or with both.[3]

No person can be detained in custody without being informed ground of arrest. Arrested detainee has right to confidential consultation with lawyer of own choice from the time of arrest and be defended by such lawyer. Such detainee has right to be produced before adjudicating authority or court within 24 hours of arrest. A detainee has right against retrospective legislation. Every detainee holds right to be presumed innocent until proved guilty by competent court based on evidences. Right against double jeopardy and right to remain silence are to be respected by investigating authority in course of detention. The detainee has right to fair trial from independent, competent and impartial court or judicial body. In case of inability to hire lawyer for legal defense, arrangements

3 Section 167 & 169 of *Muluki* Criminal Code, 2074 B.S.

for free legal aid has to be ensured mandatorily.[4] *Muluki* Criminal Procedure Code, 2074 B.S. in Section 22 mandates government doctor or health worker to carry medico-legal examination of wounds and injuries. Schedule 16 of the Code provides uniform format for Injury Examination Report. This format is used even in case of examination of detainee. Accordingly, following information should be identified and documented in injury report:

Case registration number; name of the office referred for injury examination along with letter ref. no and date; name, age, date of birth and sex of the injured person; address; name of the accompanying police personnel; name of the hospital/health center; date, time and place of examination; identification mark of the examinee; consent for examination taken from (injured person/family member or others); brief history about the incident (how and when the injuries were produced?; medical history of the examinee; general physique and vitals (height, weight, pulse, blood pressure, temperature, respiratory rate, degree of consciousness); injuries (name, size, site, color, surrounding area, signs of treatment, bleeding, marks, signs of healings, any imprints and content etc.); type of injury (simple, *angabhanga*/grievous, severe, other remarks); type of weapon/object used (blunt force, sharp force, pointed objects, projectile, heat, chemical, others to be specified); condition of patient at time of examination (severity, investigation and reports, treatment provided, referral, follow up, re-examination, opinion (condition of examinee, severity of the injury, age of the injury and possible causative objects are to be considered while framing opinion).

Name of the Examiner along with signature, qualification, professional registration no., office/hospital/health center, date should be mentioned along with seal of the hospital/ health

4 Article 20 of the Constitution of Nepal, 2072 B.S.

center. Statutory guidelines require- (i) Injury examination to be conducted by a forensic expert, to the extent possible, and by a trained doctor if such expert is not available. (ii) Report should be prepared by the injury examining expert or doctor. (iii) Report is to be computer typed to the extent possible, if not so, be prepared in understanding manner.

If any detainee oneself or anybody on behalf of such detainee complaints before court to get decree for getting bodily examination done, showing reasonable ground of possibility of assault or torture or any crime committed against such detainee, the court can issue decree to get medical examination of such detainee through government physician or physician or health professional specified by government of Nepal or as per Rule 22(2) of the *Muluki* Criminal Procedure Code, 2074 B.S. The examining physician or expert or lab has duty to forward such examination report to concerned office or investigating authority within 3 days of examination. Upon proof of torture, court is duty bound to issue decree for providing detainee victim with medical treatment, interim relief, and to take departmental action against such torture giver.

Medico legal examination of detainee is important for following purposes:

a) For assuring prevention of torture to detainee at detention.

b) For quantifying inflicted torture and severity.

c) For determining amount of compensation.

d) Improving criminal justice system of a county by upgrading detention standard.

e) Safeguarding human rights of detainee and guarantee fair trial.

Innocent citizen victimized by and compelled to stay inside prison due to negligent state activities, deserve to be

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compensated by state as held by Supreme court in *Khul Bahadur Kunwar* case.[5]

2. Investigation of Custodial Deaths

Custodial death refers death of a person while under lawful custody. The deceased might have been kept in custody for the purpose of investigation, interrogation, awaiting trial or for any other purpose. Custodial death is more suspicious than other kinds of death. Custodial death indicates inability of state authority to protect the person under custody or abuse of power by state authority against person under custody. According to recent research major reasons behind custodial deaths were mainly unawareness and carelessness. Most of the time custodial deaths are considered as unnatural because the person in the custody is solely dependent on the custodial authorities.[6]

Generally, custodial death is serious violation of human rights of custodial person. It is common that most of the custodial authorities of the developing countries misuse state power by unnecessary infliction or use of force against the person. Hence, death results due to extreme pain inflicted by the police personnel. Beside this inadequate facilities such as absence of ventilation, safe drinking water, appropriate sun light in custody room, unhygienic food etc. lead death of a person at custody.

Custodial death could be intentional, negligent or reckless. Law needs to criminalize these sorts of killings. Concerned on-duty state authorities are to be held individually liable for

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5 *Khul Bahadur Kunwar* v. *DAO, Kathmandu* et.al.; Certiorary/mandamus, NKP 2076, V 4, DN 10250

6 Vijay T. Jadhao et.al., An Overview of Custodial Deaths in Pune Six years Retrospective Study, J Indian Acad Forensic Med. July-September 2015, Vol. 37, No. 3 (Retrieved Nov. 4, 2020: http://iafmonline.in/data/publications/ 2015/ JIAFM-37(3).pdf)

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intentional, negligent and reckless killing of custodian under their control. For intentional killing inside custody, the concerned on-duty officer has to be individually responsible for homicide as well as to compensate victim. In case of custodial death due to negligence or recklessness of on-duty authority (ies), both the concerned state agent as well as State must jointly compensate the victim. State that has no capacity to protect basic life of its citizen while in its claws and custody has no authority to detain a person in the name of investigation. A citizen may turn criminal and deserve lawful sanction, but a state has no excuse to turn arbitrary. State is liable to answer for each and every illegal act committed by its servants.

Examination of custodial death needs more attention, caution, planning and organization. The investigation of custodial death is not directed only towards finding out the cause of death, but also medico legal issues of arrest and detention. When a police authority takes a person under custody for the purpose of crime investigation, the authority has dual legal and ethical duty, to investigate the offense properly and to safeguard and ensure basic human right to life of the person under custody is still protected. Thus, there is prima facie assumption of violation of human rights of the detained person if detainee dies in custody. However, repeated attempt of suicide or commission of suicide by the person, self-inflicted death in custody has also been frequently recorded.

Post-mortem examination of custodial death is necessary to ascertain the mistake or fault of the custodial authorities and to identify whether such incident is intentional, prevocational, suicidal, accidental, negligent or reckless death. This information is helpful evidence to determine criminal liability of concerned, standard of care we are providing in our detention centers and jails, and degree of state's sensitivity towards human

rights protection of crime suspects.

Post mortem examiner in a custodial death case of Sri Lanka opined that injuries, exertions, and excitement during the arrest had created an acute coronary insufficiency that caused death.[7] The police officers were subsequently charged for causing 'grievous hurt'.

Indian Supreme Court in *Yashwant* Case[8] held- With great power comes greater responsibility. Nine Maharashtra police personnel in a custodial death case were sentenced from 3 to 7 years imprisonment under Section 330 of IPC (voluntarily causing hurt to extort confession, or to compel restoration of property). The court even explained that such incidents, involving police, tend to erode people's confidence in the criminal justice system more than in cases involving private individuals. It is important that police need to recognize the concept of 'democratic policing', where crime control is not only the end but the means to achieve this order is also equally important. Those who are called upon to administer the criminal law must bear, in mind, that they have a duty not merely to the individual accused before them, but also to the State and to the community at large. Officers of Maharashtra Police while on a patrol had picked up Joinus alleging theft at 1 am on June 23, 1993. It was alleged that the police tied him to an electric pole outside his house and beaten him with sticks. After taking him to various places, he was locked up at 3.55 AM that day but was found dead in the morning. The court held- 'The manner in which Joinus was taken during late night from his house for investigation ignores the basic rights this country has guaranteed its citizen and injuries caused to the individual were in furtherance of extracting a confession.'

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7 Sri Lanka Journal of Forensic Medicine, Science & Law 2010 Vol.1 No.2.The police officers were subsequently charged for causing 'grievous hurt'.

8 *Yashwant et.al.* v. *State of Maharashtra* (2018) 4MLJ (Crl)10(SC)

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Indian Supreme court in *D.K. Basu* case[9] issued following 11 guidelines as directives to be strictly complied (as temporary guidelines prior to enacting laws) as torture preventive measures in police custody:

(1) Arresting and interrogating police personnel must bear accurate, visible and clear identification and name togs with their designations. Particulars of all such police personnel who handle interrogation of arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee should prepare a memo of arrest at the time of arrest and such memo should be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

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9 *D.K. Basu* v. *State of West Bengal* (1997 (1) SCC 416)

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a penal for all *Tehsils* and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the *illaka* Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous (clearly visible) notice board.

Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy.

Special CBI Court in Thiruvananthapuram, Kerala in India on July 25, 2018 awarded death sentence (for the first time) to two policemen in *J.Prabhavathiamma* case,[10] sending a strong message to the entire police force that their duty is to safeguard and not endanger public safety.

On 09-27-2005, Udayakumar (25 years) and his friend Suresh Kumar were picked up by two policemen, K Jithukumar and SV Sreekumar, of the Fort Police Station in Thiruvananthapuram under what the police called "suspicious circumstances" at around 2 pm. According to policemen, Rs 4,200 was found in Udayakumar's possession. The police claimed that the money was stolen by him but could not substantiate their charge. Udayakumar wanted his money back and refused to leave the station without it. Evidences point Udayakumar was given the money by his mother to buy new

10 *J. Prabhavathiamma* v. *The State of Kerala & Others WP(C).* No. 24258 of 2007 (K) AND CRL. R.P.2902 of 2007 (Retrieved: (Retrieved- Nov. 4, 2020: https://indianexpress.com/article/india/udayakumar-custodial-death-two-kerala-cops-get-death-penalty-others-jail-5275202/

clothes. After custodial torture of the most inhuman kind for 90 minutes, Udayakumar was soon separated from his friend and put inside the cell where he was tied to a metallic cot and beaten first with a *lathi* and then by a galvanised iron pipe used for plumbing purposes. The post-mortem report clearly put the cause of his death as the blows and the body rolling that he received with the pipe mainly on his thighs and other parts of the body which crushed his muscles, leading to shock, haemorrhage and death. Udayakumar's body had 22 wounds of grievous nature. By 10.30 pm, he was found motionless in the cell and declared brought dead at the Government Medical College Hospital. What followed was a mad rush by policemen at the station to cover their tracks. V's mother filed petition in Kerala High Court demanding to unearth the chain of events that led to his death. Kerala High Court asked the CBI[11] to take over the case.

What opened up the case was the discrepancy in the recording of the time of Udayakumar's arrest. While the police fudged it to 10 pm on September 27, 2005, the Crime Branch had put it as 8 pm which forced the CBI to track down Udayakumar's friend, Suresh, who had by then turned hostile. Suresh finally confirmed it as 2 pm which corroborated the corrections found in the documents at the police station which the police had made to their advantage. A separate case of theft had also been registered against Udayakumar, which the prosecution proved was done after he died- an attempt by the

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11 The CBI (Central Bureau of Investigation (CBI) is the premier investigating agency of India) established a reputation as India's foremost investigative agency with the resources for complicated cases, and it was requested to assist the investigation of crimes such as murder, kidnapping and terrorism. The Supreme Court and a number of High Courts in the country also begin assigning such investigations to the CBI on the basis of petitions filed by aggrieved parties. In 1987, the CBI was divided into the following divisions: the Anti-Corruption Division, the Special Crimes Division, the Economic Offences Division, the Policy and International Police Cooperation Division, the Administration Division, the Directorate of Prosecution Division and the Central Forensic Science Laboratory Division.

policemen to justify his custody as initially they had no case against him.

By illegally detaining an innocent man, the policemen at the Fort Police Station had not only violated all norms set by the Supreme Court pertaining to arresting an individual but had also been engaged in destruction of evidence to cover up a crime their colleagues had committed. Following the CBI takeover in 2008, half-a-dozen policemen and policewomen who were on duty at the Fort Police Station turned approvers after cases were filed against them, too. This proved crucial in the case.

Besides imposing fine of IRs 2 Lakhs to each of the two defendants who were death sentenced, the court also awarded 3 years of imprisonment to three other police defendants- retired superintendents of police TK Haridas, EK Sabu, and Dy SP Ajith Kumar for destruction of evidence. Justice certainly seems to have been done in this case although most of us don't support capital punishment. Whether harsh punishment will help to stop custodial torture and death or not is is very difficult to say. But we can say- what is needed is strong will from the top level of police for permanent eradication of custodial torture and murder.

Thus, investigation of custodial death is required to determine degree of criminal involvement or liability of custodial authorities, and identify in case if they are liable for causation of death by own illegal, unethical act or omission.

International Committee of the Red Cross (ICRC) has issued Guidelines for Investigation Deaths in Custody. It provides the purpose of investigation of custodial death is to protect the interests of all parties involved- the deceased, the next of kin, the detaining authorities, and society as a whole.[12]

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12 Available at https://www.icrc.org/eng/assets/files/publications/icrc-002-4126.pdf (Accessed on 26 April 2018)

The ICRC Guideline supports states by providing guidelines to ensure standards of investigation of custodial death.

The investigation of custodial death has threefold objectives. They are:

a) Reducing trauma and providing effective remedy for the next of kin.

b) Prosecuting and punishing those responsible, and

c) Preventing recurrence of deaths in custody.

Investigation clarifies the circumstances of death. In Nepal, the procedure of forensic examination of homicide is equally applicable in custodial death. Forensic investigation helps ascertain the facts surrounding the death, its cause, manner, location, time and so on. Generally, medico legal examination of custodial death has following importance:

- It provides information regarding cause of death- whether suicidal or due to custodial torture.
- If death is due to torture, to ascertain manner of torture.
- Helps establish liability of concerned official who caused custodial death.
- Amount of compensation to the near kin of the victim of custodial death such as wife, children, dependant parents etc. is determined by the severity of injury.
- If autopsy findings show cause of death as asphyxia, suffocation, food poisoning etc., it helps identify the standard of custody and degree of care provided to detainees. It is helpful not only to confirm death due to negligence or recklessness inside custody but even helps improve infrastructure and facilities in detention.

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- If suicidal hanging is reported in custody, it shows failure of security measures by detention administration and eventually helps formulate improved security policies.

3. Forensic Medicine in Extra-Judicial Killings and Disappearances

In those jurisdictions where law allows death penalty and killing is judicially legitimate, killing anybody without the authority of law or without judicial pronouncement is called extra-judicial killing. Generally, extra judicial killings refer unlawful killing of a person or group by state authorities. State authorities especially police agency of the state kills any person through whatever means they prefer. However, extra judicial killing covers boarder scope. It includes any killing in violation of fundamental freedom, international human rights and humanitarian law such as unlawful killing by police, deaths in military or civilian custody, and patterns of killing by private individuals, which are not adequately investigated and prosecuted by the authorities.[13]

Enforced disappearances and extrajudicial executions are clear violations of fundamental rights proclaimed in the International Human Rights Instruments. No state shall practice, permit or tolerate enforced disappearances.[14] Governments shall prohibit by law all extra-legal, arbitrary and summary executions.[15]

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13 Available at http://nepal.ohchr.org/en/resources/publications/Investigating%20Allegations%20of%20Extra-Judicial%20Killings%20in%20the%20Terai.pdf (accessed on 14 Aril 2018)

14 Article 2 of UN Declaration on the Protection of All Persons from Enforced Disappearance, 1992.

15 Article 1 of UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, 1989. Economic and Social Council

Constitution of Nepal has expressly safeguarded the right to life as fundamental right of every individual and even prohibits making of any laws in a manner to provide death penalty.[16] Thus, in Nepal not only extra judicial killing but even judicial killing is constitutionally prohibited.

Incidents of extra judicial killings and disappearance were frequently recorded in Nepal during Maoist insurgency. Unnatural custodial death also falls under extra judicial killing. People may even be forced to disappear.

Extra judicial killing is a crime against humanity. In the context of an armed conflict and under certain circumstances, extrajudicial executions can be considered a war crime. They may also amount to genocide or crime against humanity in specific contexts and if they are part of a collective practice. Many states continue to tolerate criminals on their territory, while countless victims' relatives still await.

Life is the first and most fundamental right of individuals, without which no other right can be upheld. Extrajudicial executions are a violation of this right, designating the deliberate killing of an individual by a State agent (or with his consent) without a previous judgment affording all judicial guarantees, such as a fair and unbiased procedure. The State has the obligation to promote and protect the right to life, and to prosecute the perpetrators. Medico legal examination of extrajudicial killings or and exhumation are helpful to end impunity for extrajudicial executions.

Forensic science is an important tool that helps in

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adopted these and recommends- These principles should be taken into account and respected by Governments within the framework of their national legislation and practices.

16 Supra note 6 at Art. 16

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investigation and in ascertaining fact of the cases where extra judicial killing is suspected. Autopsy of the victim of extra judicial killing may provide following valuable information:

- Range of firing
- Place of wounds and injuries
- Struggle done by victim to save own life
- Comparison of strength of victim and state authorities
- Severity of injuries
- Cause of death
- Manner of death
- Time of death
- Gravity of torture inflicted
- Presence of foreign particles in the victim's body
- Evidences of sexual assault if deceased is female
- Signs of poison administration

The above-mentioned findings are useful in further investigation extra judicial killing offence. Corroboration of post mortem findings with other circumstantial evidences help connecting victim and offender. The United Nation Minnesota Protocol provides guideline for member state to carry out investigation of offence of extra judicial killings.[17]

An individual may be disappeared through two methods. Firstly- lunatic, children, older person or mentally unaware person may disappear voluntarily. Secondly- person may be

17 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on The effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Execution

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disappeared by compulsion created by other, i.e. forced disappearance. Thus, it is done through positive act of another person. An act of enforced disappearance has been defined by Nepalese law as "not to produce before the adjudicating authority a person who is apprehended, detained or taken in custody in any other manner by the person or security personnel authorized to apprehend or make enquiry and investigation as per the law or to enforce law, or not to allow the concerned persons to visit such a person so taken in custody even after lapse of the deadline to produce such person before the adjudicating authority pursuant to the law in force or not to give information to them as to where, how and under which condition such a person has been detained."[18]

Forced disappearance is severe human rights violation of a person. Every individual is free by birth and posses freedom to movement. It is the duty of state to search disappeared person and re-connect them with their family. It is not always possible that the enforced disappeared person is found alive. They might have been killed extra judicially and disposed without information of their family members. In such situation, state has duty to give information about death to the awaiting family members or beloved ones of victim.

Each member state of International Convention for the Protection of All Person from Enforced Disappearance are required to criminalize an act of enforced disappearance. Appropriate measures in investigation of offence of enforced disappearance should be taken by the member states.[19] Forensic medicine helps in investigation and search of disappeared person through personal positive identification. Sometimes, voluntarily disappeared person may die at one place and may have been buried at another place. Skeleton may be found during

18 The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 Sec. K(1)

19 International Convention for the Protection of All Person from Enforced Disappearance 2006 Art. 3&4

exhumation. Identification is usually possible through examination of such skeleton.

The right to know also includes the right to get information about the place of burial of a missing relative, if known. Parties to a conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which it belongs or upon the request of the next of kin. They must return their personal effects to them.[20] The suffering caused by a disappearance to the relatives, as well as to the victim, in itself contravenes the right not to be tortured or subjected to cruel, inhuman and degrading treatment or punishment.[21] A national amnesty would not protect the person concerned from the threat of international prosecution. If amnesty is granted in violation of international obligations, it will probably not be accorded international legal recognition and will be ignored by international tribunals.[22]

4. Exhumation & Identification of Dead Bodies

Exhumation means digging out of an already buried body from a grave.[23]

It is done for legal purpose to determine the cause of death, time since death, manner of death and sometimes even to establish identity. Hence, exhumation is lawful disinterment or digging out of a buried body from the grave. Usually,

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20 Cited from: "Study on best practices on the issue of missing persons; Interim report prepared by Prof. Latif Hüseynov, Rapporteur of the Drafting Group of the Human Rights Council Advisory Committee", 25-29 January 2010, p. 44 (http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/session4/docs/A.HRC.AC.4.CRP.2.Rev.1.doc)

21 http://www.kypros.org/CyprusPanel/cyprus/missing.html

22 ICTY Furunzija, Case No. IT-95-17/1 Judgment, 10th Dec. 1998, para. 155 (Published in 'International REVIEW of the Red Cross'; Volume 88 Number 862 June 2006, p. 8).

23 Available at http://www.forensicpathologyonline.com/e-book/autopsy/exhumation (accessed on 24 April 2018)

exhumation is done for following purpose:

a) Medical research purpose,

b) Criminal investigation purpose,

c) Civil investigation purpose

Where there is suspicion of foul play (for e.g. homicide, criminal abortion, disputed cause of death or poisoning), exhumation is carried out to know the cause, manner, and nature of death. A disappeared person may die elsewhere and other public may bury the deceased in absence of family member. Identification of such disappeared person is important for resolving legal issues such as the person's ownership over property and dignified cremation in according to tradition.

Supreme court in *Ramesh Parajuli* case[24] had recognized relevancy and importance of establishment of DNA Databank in Nepal for peacefully bringing transitional justice into an end. The court held- 'Armed conflict in Nepal from 2052 B.S till 2063 B.S. that took lives of more than 17,000 people, forcefully disappeared more than 13,00 people is an emotional matter as well as the concern of justice. Family members of these victims have right to be informed from state regarding what had happened to their beloved one? Whether the beloved one was killed or disappeared?' Forensic science and forensic medicine in this way is helpful to settle human rights issue even in transitional justice.

NHRC Exhumation Guidelines[25] defines 'exhumation' as a process of digging out of suspicious place of earth where a person is buried after enforced disappearance and killing or after extra-judicially killing and burring of one or more persons

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24 *Ramesh Parajuli et.al.* v. *Prime Minister and Office of Prime Minister et.al* NKP 2073, V 12, DN 9732

25 Section 2(a) of National Human Rights Commission Exhumation Guidelines, 2069 B.S.

whose identity is yet to be confirmed, with the purpose of collecting human remains and evidences, examination of such evidences for identification of victims. Exhumation is to be done by complying strict procedures provided by this guideline. The guideline categorizes procedures of exhumation into three types:

a) Pre-Exhumation Procedure: The Exhumation Body formulates a detail work plan regarding exhumation. For this, the body collects all facts and evaluate facts relating to nature of incident, victim, perpetrator, suspicious place, possible number of dead bodies, needed human resources for exhumation etc. The information obtained regarding suspicion of burring of dead body are verified and more information is searched if needed. A study report shall be made based on received information. The Exhumation Body decides whether or not to exhume the place on the basis of study report prepared by the field observation group.

b) During Exhumation Procedure: Procedures to be followed during exhumation depend on the place to be exhumed and evidences available that made the place suspicious and needed for exhumation. Photographs and video of the place to be exhumed should be taken just before starting exhumation from a height, in a manner that all four corners of the site are clearly recorded. The exhumation place should be covered from tape or rope. Reference point should be determined at the place of exhumation having stable in nature and that could be taken through using global positioning system (GPS), if possible. Soil digging out of the place of burial of the dead body may contain human remains or other evidence. Hence, the soil should be cleaned (*chalne)* as per need. The soil should be examined through metal detector as per need. Similarly, the guideline also provides rules relating to recording and packing of

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discovered physical evidence, or parts of human body. The human remains and evidences derived from exhumation should be sent to concerning laboratory by Nepal Police or Exhumation Body maintaining proper chain of custody.

c) Post Exhumation Procedure: The exhumation team should submit a report within a month to Exhumation body. The minimum detail that has to be included on such report has been prescribed by the guideline itself. The concerning laboratory conducts postmortem and other necessary examination of those human remains and evidences. In this course, experts should try to figure out individuality of deceased through comparing anti mortem data and post mortem data. The laboratory should provide examination report to the sending authority after examination. The minimum details to be filled on the examination report are provided by the Guideline.

All major or minute evidences detected from the beginning of exhumation till the end, are to be recorded. The guideline also provides code of ethics for the members of exhumation group. The members are duty bound to maintain confidentiality of the information, data, facts, evidence or report obtained from exhumation. No information should be released without consent of the exhuming body. No one should be allowed to take photographs and video of restricted areas of the exhuming site. No work should be done that might impair the dignity of victim. The members of exhumation should take notice of the geographical, economic, social, religious and cultural situation of exhuming site. Norms, tradition and culture of the residence should be respected. Immediate disclosure has to be made by any member of the exhumation group before exhumation body if he or she has any relation or interest on exhumation. No member of the exhuming group should be allowed to separate from the work without permission of group head.

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Bone marrow is a good source of DNA, thus extraction of DNA through exhumed skeleton is good and may be only single determinant information for identification. DNA data extracted through exhumation could be stored in DNA Data Bank. Collection of sample DNA from the family members of disappeared person and comparison with DNA collected through the exhumation helps to determine identity and family connection.

Presence of any bone injury in the exhumed skeleton helps to estimate cause of death. For instance, presence of bullet hole in skull provides information that the possible cause of death is gunshot injury. In this way forensic medicine helps to lead exhumation process and respect human rights of disappeared person.

States must keep an official up-to-date register of all persons deprived of their liberty.[26] States must ensure thorough and impartial investigation of allegations of enforced disappearance, and must appropriately punish reprisals on the occasion of the lodging of a complaint.[27]

Acts constituting enforced disappearance are to be considered as continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared.[28] Victims and their family have a right to adequate compensation.[29]

5. Role of Forensic Medicine in Mass Disasters

Disaster may be natural, accidental, industrial or manmade.

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26 Article 10 Para 3 of The UN Declaration on the Protection of all Persons from Enforced Disappearances (Resolution 47/133 of 18 December 1992).
27 Ibid Article 13 para. 1 and 5.
28 Ibid at Article 17.
29 Ibid at Article 19.

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Earthquake, floods, landslides, cyclones, aviation accident, train accident, ship accident, bus collision, food poisoning, pandemic diseases, gas leakage, explosion, riots, war etc. are various forms or causes of disaster. The Centre for Research on the Epidemiology of Disasters (CRED), which is an international epidemiological disaster research institution, has defined a disaster as a case in which more than 10 deaths are reported, more than 100 people are affected, a national emergency has been declared, or international assistance has been requested.[30]

The number may vary based on jurisdictions. Mass disaster causes huge fatalities, injuries, and loss of property.

Forensic experts and forensic practitioners have an important role in management of mass disaster area, collection of important evidence, and support investigation. Generally, forensic medicine practitioners are responsible for following functions in mass disaster:

a) Identification of the site of incident

b) Immediate isolation and demarcation of the site for preventing foreign entry

c) To take photograph of the sites from various angles

d) Identification of bodies as far as possible

Identification of the bodies is done through application of various factors. Those may include appearance, clothing, ornaments, pocket particles, deformities or occupational marks, race, sex, age, stature, fingerprints, footprints and other relevant data. Identification of the remains of victims is very difficult job in events of mass disaster.

These serious disasters leave the victim's bodies in mutilated

30 Centre for Research on the Epidemiology of Disasters. Annual statistical review: numbers and trends 2010 CRED: Brussels 2011. [accessed on 4 January 2011]. Available at http://www.cred.be/publications.

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form, scattered, burnt beyond recognition, and remains intermixed. Hence, body parts of the victims cannot be visually identified. Sometimes, DNA test of each body particles may be required.

The role of forensic medicine in mass disaster can be summarized into two broad categories: First, in case of injured patients: The forensic medicine practitioner has a duty to identify the patient properly. Maintain their record and send them at nearest hospital for treatment. Secondly, in case of dead bodies: Forensic pathologists are primarily responsible for thorough autopsy to collect and establish following information: (i) Identity of the deceased, (ii) Cause of death, and (iii) Cause of disaster.

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